In the High Court of Judicature at Madras
Dated: 24-11-2008
Coram:
The Honourable Mr.Justice M.JAICHANDREN

W.P.No.13749 and 23725 of 2001, and
W.P.No.22619, 22620, 41753 and 34564 of 2002 and W.P.No.1258 and 3396 of 2003
W.P.No.13749 of 2001:

1.The Lakshmi Mills Company Limited,
1100, Avanashi Road,
Pappanaickenpalayam,
Coimbatore-641 037.

2.J.Soundararajan .. Petitioners.

Versus

1. The Assistant Commissioner of
Central Excise,
Coimbatore III Division,
6/7, A.T.D.Street, Race Course Road,
Coimbatore.

2. The Assistant Commissioner of
Central Excise, Koilpatti,
Chidambaranar District.

3. The Union of India, represented
by the Secretary, Ministry of Finance,
Department of Revenue, New Delhi. .. Respondents.

Prayer: Petition filed seeking for a writ of Declaration, declaring Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, notified under Notification No.45/2000-C.E. (N.T.), dated 30.6.2000, ultra vires Section 4(1)(b) and Section 37(2)(i) of the Central Excise Act, 1944, and unenforceable as ultra vires Articles 14 and 19(1)(g) and Articles 265 and 300-A of the Constitution of India.

For Petitioner : Mr.N.Prasad

For Respondents : Mr.T.S.Sivagnanam (SCCG)

W.P.No.23725 of 2001:

Tamarai Mills Limited,
No.383, Kamaraj Road,
Uppiliapalayam,
Coimbatore-641 015. .. Petitioner.

Versus

1. The Deputy Commissioner of
Central Excise, Coimbatore-III Division,
Coimbatore-641 018.

2.The Assistant Commissioner
of Central Excise,
Madurai II Division,
Bibikulam, Madurai-625 002.

3.Union of India, represented
by the Secretary, Ministry of Finance,
Department of Revenue, New Delhi. .. Respondents.

Prayer: Petition filed seeking for a writ of Declaration, declaring Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, notified under Notification No.45/2000-C.E. (N.T.), dated 30.6.2000, ultra vires Section 4(1)(b) and Section 37(2)(i) of the Central Excise Act, 1944, and unenforceable as ultra vires Articles 14 and 19(1)(g) and Articles 265 and 300-A of the Constitution of India.

For Petitioner : Mr.N.Prasad

For Respondents : Mr.G.K.R.Pandian (SCGSC)

W.P.No.1258 of 2003:

Best Cotton Mills Limited,
No.320, Best Complex,
Kumaran Road,
Tirupur-641 601 .. Petitioner.

Versus

1.The Superintendent of Central
Excise, Dharapuram.

2.The Assistant Commissioner
of Central Excise, Pollachi.

3.Union of India, represented
by the Secretary, Ministry of Finance,
Department of Revenue, New Delhi. .. Respondents.

Prayer: Petition filed seeking for a writ of Declaration, declaring Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, notified under Notification No.45/2000-C.E. (N.T.), dated 30.6.2000, ultra vires Section 4(1)(b) and Section 37(2)(i) of the

Central Excise Act, 1944, and unenforceable as ultra vires Articles 14 and 19(1)(g) and Articles 265 and 300-A of the Constitution of India.

For Petitioner : Mr.N.Prasad

For Respondent : Mr.P.Mahadevan (SCCG)

W.P.No.22619 of 2002:

Poppys Spinning Mills (P) Ltd.,
Muthur Road,
Mulanur-638 106, Erode District. .. Petitioner.

Versus

1. The Superintendent of Central Excise,
Dharapuram Forward Sector,
76/60, M.S.P.Nagar,
Dharapuram-638 656.

2.Assistant Commissioner of Central
Excise, Beach Road, Pondicherry-1.

3. The Union of India, represented
by the Secretary, Ministry of Finance,
Department of Revenue, New Delhi. .. Respondents.

Prayer: Petition filed seeking for a writ of Declaration, declaring Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, notified under Notification No.45/2000-C.E. (N.T.), dated 30.6.2000, ultra vires Section 4(1)(b) and Section 37(2)(i) of the Central Excise Act, 1944, and unenforceable as ultra vires Articles 14 and 19(1)(g) and Articles 265 and 300-A of the Constitution of India.

For Petitioner : Mr.N.Prasad

For Respondents : Mr.O.V.Krishnan (ACGSC)

W.P.No.22620 of 2002:
Thirupur Suriya Textiles Pvt Ltd.,
Suriyaprabha Garden,
No.5, M.P.Nagar Extn.,
Pillaiyar Koil Thottam,
Tirupur-641 607. .. Petitioner.

Versus

1. The Superintendent of Central Excise,
Vedasandur Range, 2/9-G, N.G.O.Colony
Dindigul-624 009.

2.The Assistant Commissioner of
Central Excise, Dindigul Division,
No.30, Mengles Road,
Dindigul-624 001.

3.The Commissioner of
Central Excise, Madurai Collectorate,
6, Lal Bahadur Sastri Road,
Madurai-625 002.

4. The Union of India, represented
by the Secretary, Ministry of Finance,
Department of Revenue, New Delhi. .. Respondents.

Prayer: Petition filed seeking for a writ of Declaration, declaring Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, notified under Notification No.45/2000-C.E. (N.T.), dated 30.6.2000, ultra vires Section 4(1)(b) and Section 37(2)(i) of the Central Excise Act, 1944, and unenforceable as ultra vires Articles 14 and 19(1)(g) and Articles 265 and 300-A of the Constitution of India.

For Petitioner : Mr.N.Prasad

For Respondents : Mr.O.V.Krishnan (ACGSC)

W.P.No.34564 of 2002:

Divya Spinning Mills Private Limited,
No.61, Lakshmi Nagar,
50 Feet Road, Tiruppur-641 602. .. Petitioner.

Versus

1. The Superintendent of
Central Excise, Gobi Range,
Erode Division, Gobichettipalayam,
Tamilnadu.

2.Union of India, represented
by the Secretary, Ministry of Finance,
Department of Revenue, New Delhi. .. Respondents.

Prayer: Petition filed seeking for a writ of Declaration, declaring Rule 8 of the Central Excise

Valuation (Determination of Price of Excisable Goods) Rules, 2000, notified under Notification No.45/2000-C.E. (N.T.), dated 30.6.2000, ultra vires Section 4(1)(b) and Section 37(2)(i) of the Central Excise Act, 1944, and unenforceable as ultra vires Articles 14 and 19(1)(g) and Articles 265 and 300-A of the Constitution of India.

For Petitioner : Mr.N.Prasad

For Respondents : Mr.T.S.Sivagnanam (SCCG)

W.P.No.3396 of 2003:

Sumangala Steel Limited,
Bhuvanagiri, Cuddalore District. .. Petitioner.

Versus

1. Superintendent of Central Excise,
No.14, Bazaar Road,
Virudachalam Range, Virudachalam.

2.Deputy Commissioner of Central
Excise, Central Excise Division,
47, Opp. To Government Hospital,
Cuddalore-607 001.

3.Union of India, represented
by the Secretary, Ministry of Finance,
Department of Revenue, New Delhi. .. Respondents.

Prayer: Petition filed seeking for a writ of Declaration, declaring Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, notified under Notification No.45/2000-C.E. (N.T.), dated 30.6.2000, ultra vires Section 4(1)(b) and Section 37(2)(i) of the Central Excise Act, 1944, and unenforceable as ultra vires Articles 14 and 19(1)(g) and Articles 265 and 300-A of the Constitution of India.

For Petitioner : Mr.N.Inbarajan

For Respondents : Mr.M.Devadoss (CGSC)

W.P.No.41753 of 2002:

Sumangala Steels Limited,
PIPDIC Industrial Estate,
Mettupalayam, Pondicherry. .. Petitioner.

Versus

1. Superintendent of Central Excise,
Range-III, No.64, Sringerimadam Street,
Sivaganga Nagar, Pondicherry-11.

2.Assistant Commissioner of Central
Excise, Beach Road, Pondicherry-1.

3. The Union of India, represented
by the Secretary, Ministry of Finance,
Department of Revenue, New Delhi. .. Respondents.

Prayer: Petition filed seeking for a writ of Declaration, declaring Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, notified under Notification No.45/2000-C.E. (N.T.), dated 30.6.2000, ultra vires Section 4(1)(b) and Section 37(2)(i) of the Central Excise Act, 1944, and unenforceable as ultra vires Articles 14 and 19(1)(g) and Articles 265 and 300-A of the Constitution of India.

For Petitioner : Mr.N.Prasad

For Respondents : Mr.V.Bharathidasan (SCCG)

O R D E R

Heard the learned counsel appearing for the petitioners and the learned counsels appearing for the respondents.

2. A common order is passed in the above writ petitions, since the facts and circumstances and the issues arising for consideration are similar in these writ petitions.

3. This writ petition has been filed praying for a Declaration, declaring Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, notified under Notification No.45/2000-C.E. (N.T.), dated 30.6.2000, ultra vires Section 4(1)(b) and Section 37(2)(i) of the Central Excise Act, 1944, and unenforceable as ultra vires Articles 14 and 19(1)(g) and Articles 265 and 300-A of the Constitution of India.

4. It has been stated that under the provisions of the Central Excise Act, 1944, the duty of Excise is levied, as per Section 4 of the Act. The excise duty is imposed on the transaction value, namely, the price at which goods are sold in the course of wholesale sale to an unrelated person. On the sale of cotton yarn, the petitioner Mill has been remitting duty on the actual selling price, which is the transaction value. Until the impugned amendment of the Rules by a Notification No.45/2000-C.E. (N.T.), dated 30.6.2000, duty was imposed for yarn captively used for knitting on the cost plus profit, if any, of the industrial unit. After the impugned amendment, the duty is imposed on the yarn which is not sold on the basis of the cost of production plus a notional 15% gross profit to arrive at the assessable value. There is a huge disparity between the transaction value of sales and the transaction value arrived at on notional basis. Therefore, the petitioner has not been in a position to remit the duty on the deemed gross profit to arrive at the notional value. It makes the marketing of the product uneconomic.

5. It has been further stated that the provisions of the Act impose a duty of excise taking the value as determined, under Section 4 of the Act. Under Section 4, as it originally stood, the value was taken as `the normal price', under Section 4(1)(a), that is to say, that the price at which such goods are ordinarily sold by the assessees to the buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale. Under Section 4(1)(b) where the normal price for such goods is not ascertainable, the value was arrived at the nearest ascertainable equivalent thereof, determined in such manner as may be prescribed. During the period when "normal price" governed the assessment, the Central Excise (Valuation) Rules, 1975, made under Section 37 of the Act, provided for determination of matters, under Section 4(1)(b) of the Act. Rule 6(b)(ii) was always resorted to assess goods manufactured in-house and captively consumed within the factory for which there was no normal price. Rule 6(b)(ii), during the relevant period, read as follows:
"if the value cannot be determined under sub-Clause (i) on the cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods"

6. Section 4 of the Central Excise Act, 1944, underwent certain changes, as substituted by Section 94 of the Finance Act, 2001, wherein, duty was chargeable on the transaction value on each removal of the goods. Under Section 4(1)(b), in cases where the goods are not sold, the value was to be determined in such manner as may be prescribed. By Notification No.45/2000-C.E. (N.T), dated 30.6.2000, the Central Excise (Valuation) Rules, 1975, were recast by the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The expression `normal transaction value' was defined as the value at which the greatest aggregate quantity of goods are sold. Rule 8 of the said Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, issued under the said Notification No.45/2000-C.E. (N.T.), dated 30.6.2000, under which the assessments of the petitioners are completed for captive consumption, and which is challenged in the present writ petition, reads as follows:
"Rule 8: Where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture or other articles, the value shall be one hundred and fifteen percent of the cost of production or manufacture of such goods."
Section 37(2)(i) of the Act in so far as it relates to the power to prescribe valuation for the purpose of Section 4 of the Act, states that the Central Government may `provide for determining under Section 4 the nearest ascertainable equivalent of the normal price'.

7. Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, as notified under Notification No.45/2000-C.E. (N.T), dated 30.6.2000, is ultra vires, Section 4(1)(b) and 37 of the Act. The authority under Section 4(1)(b) is to arrive at the value as near equivalent to the transaction value, or the normal price. The Rule cannot ignore the actuals under the Act. It has also been stated that the impugned Rule 8 is ultra vires Section 37(1), which is to determine the nearest ascertainable equivalent of the normal price. Section 37(2)(i) enables determining for Section 4 "the nearest ascertainable equivalent of the normal price ". The normal price for Section 4 is the price at which the goods are sold being the transaction value. Thus, the impugned rule is ultra vires Section 37(2)(i). The earlier Rule 6(b)(ii) was in keeping with the rule making powers, under Section 37 of the Act. The impugned rule introduced by Notification No.45/2000-C.E. (N.T.), dated 30.6.2000, is admittedly in exercise of the powers under Section 37 of the Act and therefore, it cannot go beyond the powers conferred.

8. It has been further stated that the impugned rule introduces an arbitrary value in respect of the goods not sold. The 15% taken as profit, irrespective of the nature of the industry, the period during which the goods are manufactured and the transaction value as available in the market, is arbitrary and violative of Article 14 of the Constitution of India. Further, the impugned Rule 8, suffers from the vice of hostile discrimination in dealing with unequal situations equally and there is a failure to

classify. The impugned Rule ignores the fact that the profit can only be the manufacturing profit and not the notional profit. It has been further stated that the impugned Rule places an unreasonable restriction on the petitioner's right available under Article 19(1)(g) of the Constitution of India. It discriminates the petitioner from other manufacturers and thus, creating serious loss and damage to the business of the petitioner.

9. The learned counsels appearing on behalf of the respondents, while denying the contentions raised by the learned counsels appearing on behalf of the petitioners, had submitted that as a measure of simplification, it has been decided to value the goods which are captively consumed on cost construction method, as provided in Rule 8 of the Central Excise (Valuation) Rules 2000, as there were disputes in adopting the values of comparable goods. The assessable value of captively consumed goods will be taken at 115% of the cost of manufacture of goods even if identical, or comparable goods are manufactured and sold by the same assessee. The concept of deemed profit for notional purposes has been done away with and a margin of 15% by way of profit etc., is prescribed in the Rule in case of assessment of goods used for captive consumption. The intention of the Government is to make the Valuation Rules as simple as possible and free from ambiguity.

10. It has been further stated that as per Section 4(1)(a), in a case where the goods were sold by the assessee for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, the transaction value as per Section 4(1)(b) in any other case, including the case where the goods are not sold, would be the value determined in such manner as may be prescribed, under the Central Excise (Valuation) Rules, 2000.

11. Section 37 of the Central Excise Act, is an empowering Section under which the Central Government has the power to make Rules to carry into effect the purposes of the Act which may provide determining value under Section 4 and Section 37(2)(i) is a subject category on which Rules may be framed to provide for determining the value. Accordingly, the Central Government, by virtue of Section 37 of the Central Excise Act, 1944, has made the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, and notified the same under Central Excise Notification No.45/2000-CE (N.T.), dated 30.6.2000, effective from 1st July, 2000. Therefore, the value of goods captively consumed has to be determined, when the price is not the sole consideration for sale, in accordance with Rule 8 of the Central Excise (Valuation) Rules, 2000, with effect from 1.7.2000. In such circumstances, the writ petitions preferred by the petitioners are unsustainable, as they are devoid of merits.

12. At this stage of the hearing of the writ petitions, the learned counsels for the petitioners had submitted that instead of this Court granting the prayer, as prayed for in the writ petitions, it would suffice if this Court is pleased to permit the assessees to go before the concerned authorities, with regard to the issues arising in relation to the valuation of goods captively consumed, relying on the Central Excise Circular No.692/8/2003-CX, dated 13.2.2003, as well as the decision of the Larger Bench made in Ispat Industries Ltd., Vs. Commissioner of C.Ex., RAIGAD [2007(209) E.L.T. 185 (Tri.-LB)].

13. In view of the limited prayer made on behalf of the petitioners it is observed that it goes without saying that the authorities concerned would take note of the Circular and the decision of the Larger Bench cited supra before deciding the issues arising for consideration, if they are found to be applicable at the relevant point of time. Therefore, no further orders are required to be passed. Hence, the writ petition stands closed with the above observations. No costs.

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To

1.The Superintendent of Central
Excise, Dharapuram.

2.The Assistant Commissioner
of Central Excise, Pollachi.

3. The Secretary
Union of India, Ministry of Finance,
Department of Revenue, New Delhi.

4. Superintendent of Central Excise,
No.14, Bazaar Road,
Virudachalam Range, Virudachalam.

5.Deputy Commissioner of Central
Excise, Central Excise Division,
47, Opp. To Government Hospital,
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of Central Excise,
Madurai II Division,
Bibikulam, Madurai-625 002.

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Central Excise, Gobi Range,
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76/60, M.S.P.Nagar,
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Dindigul-624 009.

15.The Assistant Commissioner of
Central Excise, Dindigul Division,
No.30, Mengles Road,
Dindigul-624 001.

16. The Commissioner of
Central Excise, Madurai Collectorate,
6, Lal Bahadur Sastri Road,
Madurai 625 002